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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LAWRENCE SHURTZ et al., Plaintiffs, Cross-defendants and Appellants, v. JAMES ROBERT GORSKI et al., Defendants, Cross-complainants and Appellants.	E043744 (Super.Ct.No. RIC410932) OPINION
BRUCE LEEK, Plaintiff, v. JAMES ROBERT GORSKI et al., Defendants.	(Super.Ct.No. RIC410740)

APPEAL from the Superior Court of Riverside County. Erik Michael Kaiser, Judge. Affirmed.

Reid & Hellyer and Christopher L. Peterson for Plaintiffs, Cross-defendants and Appellants.

Gibbs, Giden, Locher, Turner & Senet and James I. Montgomery, Jr., for Defendants, Cross-complainants and Appellants.

The Shurtzes sued the Gorskis, seeking an easement for structures on their property which encroached on a portion of the Gorskis' adjoining property. They also sought a declaration that the Gorskis were not entitled to travel over the portion of a private road which is part of their property. (They also sought damages for trespass and conversion, but raise no issue on appeal concerning those causes of action.) The Gorskis cross-complained for quiet title to their property and to an easement over the roadway, arguing that there was no other reasonable means of access to a portion of their property. After a jury trial, judgment was entered granting the Shurtzes two easements for the encroaching structures and granting the Gorskis an implied easement for use of the road. Both parties appealed.[1]

BACKGROUND

The Implied Roadway Easement

The Shurtzes and the Gorskis own adjoining properties along Ortega Highway in Lake Elsinore, near the Orange County/Riverside County line, in an area commonly referred to as "El Cariso Village." Part of the Gorskis' 32-acre parcel is in Orange

[1] The Shurtz/Gorski case (Riverside Super. Ct. No. RIC410932) was consolidated for trial with a related case (*Leek v. Gorski* (Super. Ct. Riverside County, 2007, No. RIC410740).). No appeal was taken in case No. RIC410740.

County; part is in Riverside County. The Shurtzes reside on their property. The Gorskis do not.[2] They purchased the largely unimproved acreage in 2002, with the intention that James Gorski would use it to house several horses and develop it into a ranch with a residence, and possibly into an equestrian camp for children.

Access to the Shurtz property and to the Gorski property from Ortega Highway is via a private road called Monte Vista. Monte Vista extends from Ortega Highway to the Orange County line, at the point at which the Shurtz property adjoins the northeast corner of the Gorski Orange County property. The Shurtz property lies generally to the east of Monte Vista, while the Gorski property lies generally to the west of Monte Vista. (Monte Vista curves, and at some points the Shurtz property is north of the road and the Gorski property is south of the road.)

The Shurtz and Gorski properties were originally part of a parcel owned by Arthur Watson. In 1946, Watson deeded a parcel which included what are now the Shurtz and Gorski properties to Ivy Teeple. The parcel also included property which was later divided from what became the Shurtz and Gorski properties. Watson retained the rest of the original parcel. In the deed to Ivy Teeple, Watson granted a roadway easement on the property he retained, for the benefit of the property he conveyed to Teeple, and reserved a roadway easement on Teeple's property for the benefit of the property he retained. The

[2] The Shurtzes are husband and wife; the Gorskis are mother and son. Further references to "Gorski" in the singular refer to James Gorski.

easements consisted of a 15-foot-wide strip on each of the two properties, on either side of a center line, creating a 30-foot-wide roadway.

Ivy Teeple conveyed her parcel to Ray and Georgiana Teeple, granting and reserving similar easements. The Teeples conveyed the portion of the parcel which later became the Shurtz and Gorski properties to Adele Rippey. That deed did not grant or reserve a roadway easement for the benefit of either the Shurtz or Gorski property. In 1964, Rippey conveyed what is now the Gorski property to El Cariso, Inc. Two deeds were recorded for that conveyance—one for the Orange County portion of the parcel, and one for the Riverside County portion of the parcel. The Riverside County deed reserved an easement for street and other purposes, but it extended only to the Riverside County line. The Orange County deed did not include an easement.

Monte Vista was in existence at least as early as 1947, and has remained in existence at all times since. It is the means of access to a number of other properties on which residences have been built.

Gorski can gain access to the Riverside County portion of his property using only the side of Monte Vista which is on his property. However, in order to gain access to the Orange County portion of the property, it is necessary to turn across Monte Vista and thus traverse a few feet of the Shurtz property. There is no reasonable means of access to the Orange County portion of the property from the Riverside County portion.[3] After

[3] The Shurtzes disputed this below. However, the jury's special verdict includes a finding that a road easement over the Shurtzes' property is reasonably necessary to

[footnote continued on next page]

Gorski purchased the property in 2002, the Shurtzes informed him that he was trespassing by doing so.

The Encroachment Easement

The Shurtzes' house, which was built on the foundation of a burned-down house which was on the property before they purchased it, is built close to the boundary with the Gorskis' Orange County property. The permits for the original house indicated that there was a 12-foot setback from the house to the property line. The Shurtzes understood that a retaining wall behind the house was also within their property, at least eight to 10 feet from the property line. The retaining wall and some stone steps leading to the rear of the property were in existence when they bought the property, and they relied on the permits for the original house to determine where to build their house. The Shurtzes conceded that the retaining wall, a sidewalk between the house and the retaining wall, the stone steps and the eaves on one side of the house do encroach on the Gorskis' property. They sought an easement over a small portion of the Gorskis' property in order to maintain the retaining wall and other structures.

The court awarded the Shurtzes an exclusive easement to the boundary area which includes the roof eaves, the sidewalk and the retaining wall, in exchange for a payment of $960, and a nonexclusive easement in an area behind the retaining wall to permit them access to maintain the wall. The Gorskis state that the exclusive easement consisted of

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[footnote continued from previous page]
Gorski's use of the property. On appeal, the Shurtzes do not dispute the sufficiency of the evidence in support of that finding.

421 square feet, while the nonexclusive easement consisted of 634 square feet. They do not cite to the record to support the square footage, but the matter does not appear to be in dispute.

LEGAL ANALYSIS

THE SHURTZ APPEAL

SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGMENT GRANTING THE GORSKIS AN IMPLIED ROADWAY EASEMENT

Civil Code section 1104 provides, "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." Thus, an easement which not expressly provided for in the deed will be implied, when, at the time of conveyance of property, the following conditions exist: 1) the owner of property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property or of the easement was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the land granted. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8.)

The Shurtzes contend that there was insufficient evidence to support the judgment granting the Gorskis an implied easement over the roadway to cross their property because there was "no" evidence that at the time the Shurtz and Gorski properties were divided and the Gorski property was granted by the Teeples to Adele Rippey, the grantors had any intention of providing an easement on the Shurtz side of Monte Vista for the benefit of the Gorski property.

In reviewing a claim of insufficiency of the evidence, we begin with the presumption that the judgment is correct and that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*).) The appellant has the burden of demonstrating that there is no substantial evidence to support the challenged finding. (*Ibid.*) In their opening brief, the Shurtzes contend that the judgment must fail because there was no direct evidence as to the intent of the Teeples or Rippey. However, in determining whether an implied easement exists, the court will "give effect to the actual intent of the parties *as shown by all the facts and circumstances*." (*Fristoe v. Drapeau*, *supra*, 35 Cal.2d at p. 8, italics added; see *Tusher v. Gabrielsen*, *supra*, 68 Cal.App.4th at p. 141.) Here, there was a great deal of evidence concerning the history of express easements over Monte Vista which predated the division of the Shurtz and Gorski properties and about the use of Monte Vista for access to properties in El Cariso Village. There was also testimony by Craig Strickland, who owned the Gorski property from 1964 until 1990 and from 1993 until he sold it to the

Gorskis in 2002, that he routinely used Monte Vista when he visited the property, including the Orange County portion of the property.

In the absence of a showing that *none* of that evidence was sufficient to support the reasonable conclusion that the last common owner of the two parcels intended to pass an easement for access to the Gorski property, as found by the jury, we will presume that there was sufficient evidence to support that conclusion. (*Foreman, supra,* 3 Cal.3d at p. 881.) It is not sufficient to assert, as the Shurtzes do, that there is "no" evidence to support a disputed finding, when in fact there is much evidence which pertains to that finding. The weight and significance to be accorded to that evidence is exclusively within the province of the trier of fact; on appeal, we do not reweigh evidence. (*Tusher v. Gabrielsen, supra,* 68 Cal.App.4th at p. 143.) Nor is it sufficient to describe the evidence only in the light contrary to the jury's finding, as the Shurtzes do in their reply brief. To do so is merely to reargue their case by citing to the evidence in favor of their position. This is not sufficient to sustain their burden on appeal. (*Ibid.*; see also *Foreman,* at p. 881.)

THE COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING THE GORSKIS' EXPERT WITNESS TO TESTIFY

The Shurtzes contend that the trial court abused its discretion by allowing the testimony of the Gorskis' expert witness, Lore Hilburg, an attorney with expertise in matters pertaining to title to real property, including easement rights. The Shurtzes complain that Hilburg was permitted to testify on the law pertaining to implied

easements. They are correct that an attorney may not render an opinion on an ultimate legal issue. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1168-1169, 1178.) However, the trial court sustained every objection the Shurtzes made on the ground that Hilburg was impermissibly rendering an opinion on the law, and it struck Hilburg's testimony to the extent that she rendered such opinions. The court permitted Hilburg to testify only to the facts which in her opinion supported the conclusion that the Gorskis had an implied easement.

The Shurtzes contend that Hilburg's testimony nevertheless "invaded the province of the Court and the jury" because she was allowed to testify that the existence of a road sufficed to establish an easement. The Shurtzes are correct that their attorney objected that Hilburg had testified that "'if' there is a road there," one of the elements of an implied easement was satisfied. The attorney argued, "That's not the state of [the] law. There has to be a use of the road." The problem is that Hilburg did *not* testify as the attorney represented. Rather, immediately prior to the objection, Hilburg was discussing the Teeple deed, which first divided the Shurtz and Gorski parcels between different owners. She testified that "if there is going to be an easement by implication, this is the document that would create it. It would be created at this moment in time, because that's the first separation and [*sic*] ownership between . . . the Gorski property . . . and the Shurtz property . . . ." It was this testimony which drew the objection the Shurtzes cite, and their objection was that although Hilburg could properly testify that the deed created the severance, "she can't say this document created the easement by implication." The

court sustained the objection and struck Hilburg's testimony. However, the attorney's comment during the discussion which ensued after the objection, that Hilburg had incorrectly stated that an easement exists "if" there is a road, is unsupported by the record. Hilburg simply did not say that. Accordingly, there was no invasion of the jury's factfinding province, as the Shurtzes contend.

THE COURT DID NOT ERR IN ALLOWING HILBURG TO CHANGE HER DEPOSITION TESTIMONY

The Shurtzes contend that Hilburg's testimony concerning the implied easement should have been excluded all together because in her deposition, she testified solely that in her opinion the Gorskis had an express easement. Her opinion was based on the deeds in the chain of title "and nothing else." Before signing her deposition transcript, Hilburg amended her testimony in writing, to assert that an easement could be implied from the deeds.

The Shurtzes filed two motions in limine to exclude Hilburg's testimony, first as lacking foundation and being based on speculation, and second because she had changed her testimony to include the new theory. The court denied both motions.

The Shurtzes contend that the trial court abused its discretion by admitting Hilburg's testimony over their objection. (See *Summers v. A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at p. 1168 [determination that expert testimony is admissible is reviewed for abuse of discretion].) With respect to the objection that Hilburg had changed her testimony, the court stated that Hilburg was "offered . . . up" for another deposition and

that if the Shurtzes had seen any need to depose her on her new opinion, they could have done so. Because they did not do so, the court concluded that the Shurtzes were not prejudiced by Hilburg's new opinion. On appeal, the Shurtzes claim that they could not have taken Hilburg's deposition because the time to conduct discovery had passed. They assert that the trial was to start on May 30, 2006, and that they did not receive Hilburg's changes until June. However, the trial did not in fact begin until September 6, 2006. They do not explain why they did not seek leave to conduct the deposition, if they deemed it necessary and if the court's permission was required. Nor do they provide any persuasive argument as to how they were prejudiced by their supposed inability to depose Hilburg further. She explained, in her amendment to her deposition testimony, the basis for her new opinion, and the Shurtzes did not appear to have any difficulty challenging her opinion at trial. Accordingly, we see neither an abuse of discretion nor any prejudice resulting from the denial of the motions in limine.

THE GORSKI CROSS-APPEAL

THE DOCTRINE OF ELECTION OF REMEDIES DOES NOT APPLY

The Gorskis contend that the court improperly granted the Shurtzes a nonexclusive easement to maintain the retaining wall on a prescriptive easement theory and an exclusive easement on another portion of the property for the encroachments on a theory of balancing the hardships. They contend that the Shurtzes were required to elect one theory or the other.

When a person has two concurrent remedies to obtain relief *on the same state of facts* and the remedies are inconsistent, he must elect between them. (3 Wikin, Cal. Procedure (5th ed. 2008) Actions, § 179, p. 259.) Here, the Shurtzes did not seek a single easement under two inconsistent theories; rather, they sought two separate easements. The doctrine of election of remedies does not apply.

THE GORSKIS HAVE FAILED TO DEMONSTRATE THE ABSENCE OF SUBSTANTIAL EVIDENCE IN SUPPORT OF THE JUDGMENT AWARDING A PRESCRIPTIVE EASEMENT

To establish a prescriptive easement, the plaintiff must show a use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.) The Gorskis contend that there was insufficient evidence to support the jury's factual findings as to the elements of the prescriptive easement because (1) there was no "true" adverse act until the Shurtzes put up a fence with a "no trespassing" sign after the Gorskis bought their property and (2) because although the retaining wall and the sidewalk leading to the wall were actual structures which could be seen by the owner of the Gorski property, "the same would not hold true for the easement area granted."

The Gorskis' contention requires them to demonstrate that there is *no* substantial evidence to support the jury's findings of an open, notorious and adverse use of the property. In order to meet that burden, it is not enough merely to assert that the evidence is insufficient or to recite only the facts, as they see them, which do not support the

findings. Rather, they are required to set forth *all* material evidence on the challenged findings and to explain why, as a matter of law, the evidence is not sufficient. (*Foreman*, *supra*, 3 Cal.3d at p. 881.) The Gorskis have not done so. Accordingly, we deem the issue forfeited.

In connection with this argument, the Gorskis also contend that the court improperly required them to remove a fence which was within the nonexclusive easement. They contend that this requirement is "the equivalent of transforming this non exclusive easement in to [*sic*] one having the appearance of an exclusive easement." In the single case they cite in support of their argument, the appellate court held that the trial court erred in imposing an agreed boundary line at the location of a fence, which one property owner had placed 10 feet inside the neighboring property, and in granting a prescriptive easement in the 10-foot section of the defendant's property. The fence barred all access to the property and precluded the owner from entering or making any use of his land. (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1301-1302, 1303-1305, 1307-1308.) Here, the Gorskis are not complaining of a fence which excludes them from the easement, but rather an order requiring them to *remove* a fence. Moreover, the Shurtzes' easement is solely for access to the area behind the retaining wall for maintenance purposes; it does not preclude Gorski from making use of the property, as long as the use permits the Shurtzes access to maintain the retaining wall. Thus, *Mehdizadeh v. Mincer* is inapposite, and the Gorskis have failed to show that the prescriptive easement precludes them from entering or making any use of their land.

THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE SHURTZES AN EXCLUSIVE EASEMENT

The Gorskis contend that the trial court's award of an exclusive easement in the area on which the roof eaves, a sidewalk, the retaining wall and the stairs encroach on the Gorskis' property was an abuse of discretion. In support of their position, the Gorskis discuss several cases which address the scope of a court's discretion. They do not, however, relate the holdings of those cases to the particular facts of this case, and they do not explain in what regard the trial court's decision was an abuse of discretion. In the absence of any meaningful argument, we deem review of the issue forfeited. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.)

THE GORSKIS HAVE FAILED TO DEMONSTRATE ERROR WITH RESPECT TO THE ROAD EASEMENT

The Gorskis contend that their road easement should be 15 feet wide, in accordance with the road easements granted and retained in the earlier deeds, prior to division of the properties. They also contend that the gate the Shurtzes erected over the road on their property "should" be removed. Neither argument is supported by citation to legal authority, nor even a discussion as to the applicable standard of review. Again, in the absence of meaningful argument and of citation to pertinent authority, we deem review of these issues forfeited.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Gaut
J.

/s/ King
J.